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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-5555

LARRY GENE HEATH,

Petitioner,

v.

STATE OF ALABAMA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

I.

WHEN THE STATE OF ALABAMA TRIED, CONVICTED AND SENTENCED PETITIONER TO DEATH FOR A MURDER THAT OCCURRED IN THE TERRITORIAL JURISDICTION OF THE STATE OF GEORGIA AND WHEN FOR THE SAME MURDER PETITIONER HAD ALREADY BEEN CONVICTED AND SENTENCED TO LIFE IMPRISONMENT BY THE STATE OF GEORGIA, DID THE STATE OF ALABAMA VIOLATE THE DOUBLE JEOPARDY CLAUSE AND THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT?

II.

DOES THE CONCEPT OF DUAL SOVEREIGNTY PERMIT THE STATE OF ALABAMA TO TRY AND CONVICT AN INDIVIDUAL FOR THE SAME CONDUCT FOR WHICH HE HAD ALREADY BEEN CONVICTED AND SENTENCED BY THE STATE OF GEORGIA, WHEN THE CONDUCT IS NOT LEGALLY DISTINGUISHABLE AND SERVES IDENTICAL PURPOSES UNDER BOTH CAPITAL MURDER STATUTES, AND DOES THIS ACTION BY THE STATE OF ALABAMA CONFLICT WITH THIS COURT'S RATIONALE IN BROWN v. OHIO, 432 U.S. 161 (1977)?

III.

WHEN THE STATES OF ALABAMA AND GEORGIA CLOSELY COOPERATED IN THE INVESTIGATION AND PREPARATION OF THE MURDER CASE AGAINST PETITIONER, DID THE ALABAMA PROSECUTION OF THE MURDER WHICH FOLLOWED THE DISPOSITION OF THE SAME MURDER CHARGES BY THE STATE OF GEORGIA VIOLATE THE DOUBLE JEOPARDY CLAUSE AND THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

IV.

WHEN THE STATE OF ALABAMA SENTENCED AN INDIVIDUAL TO DEATH FOR A MURDER FOR WHICH THAT INDIVIDUAL HAD ALREADY RECEIVED A SENTENCE OF LIFE IMPRISONMENT FROM THE STATE OF GEORGIA, DOES THAT DEATH SENTENCE VIOLATE THE CONSTITUTIONAL PRINCIPLES ENUNCIATED IN BULLINGTON v. MISSOURI, 45. U.S. 430 (1980), AND ARIZONA v. RUMSEY, 104 S.Ct. 2305 (1984)?

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v.	*	No. 84-_____
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	*	
STATE OF ALABAMA,	*	
	*	
Respondent	*	

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

Petitioner, Larry Gene Heath, requests that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama in Ex parte: Larry Gene Heath, ___ So.2d ___ (Ala. July 6, 1984). Larry Gene Heath is currently under sentence of death in the State of Alabama.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Alabama was rendered on July 6, 1984. The Supreme Court of Alabama affirmed the judgment of the Alabama Court of Criminal Appeals. Ex parte: Larry Gene Heath, ___ So.2d ___ (Ala. July 6, 1984) (Attached hereto as Appendix A).

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on July 6, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). On August 28, 1984, Mr. Justice Powell granted an application for extension of time to file this petition for writ of certiorari, until and including October 4, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following provisions of the Georgia and Alabama Codes, the texts of which are contained in Appendix B attached to this petition:

Georgia Code Annotated §26-1101 [OCGA §16-5-1]

Georgia Code Annotated §27-2528 [OCGA §17-10-32]

Georgia Code Annotated §27.2534.1(b) [OCGA §17-10-30(b)]

Alabama Code §13A-5-40(a)(1)

Alabama Code §13A-5-53(b)(2)

Alabama Code §15-2-3

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues in the Questions Presented above were raised in the trial court, on appeal to the Alabama Court of Criminal Appeals and in the Alabama Supreme Court; all were decided adversely to Petitioner.

STATEMENT OF THE CASE

(i) Statement of Facts

August 31, 1981, the body of Rebecca Heath was found in the back seat of a car, off the side of a road in Troup County, Georgia. On November 3, 1981, Petitioner, Mr. Larry Heath, who was the husband of Rebecca Heath, and five other persons were indicted for her murder by a grand jury of Troup County, Georgia. The indictment alleged that "on the date of August 31, 1981, in the County aforesaid, [the six named persons] did then and there unlawfully and with malice aforethought cause the death of Rebecca McGuire Heath, a human being, by shooting her with a gun, a deadly weapon." Record at 740-1, 750-1, 798-9.

On November 3, 1981, the State of Georgia served notice of an aggravating circumstance, thereby informing Petitioner that it would seek the death penalty.

On February 10, 1982, in the Superior Court of Troup County, Georgia, Petitioner pled guilty to the murder, and received a sentence of life imprisonment.

(ii) Course of the Proceedings

On May 5, 1982, almost three months after the disposition of the charges in Georgia, Petitioner was indicted by a grand jury of Russell County, Alabama for the murder during a kidnapping of Rebecca Heath. The indictment did not alleged the location of the commission of any element of the offense.

On December 10, 1982, Petitioner's pleas of autrefois convict and former jeopardy under the Alabama Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution were denied.

On January 12, 1983, the Petitioner's pleas of autrefois convict and former jeopardy, and his plea to jurisdiction, were denied.

On January 12, 1983, at the guilt-finding phase of his trial, a jury found Petitioner guilty on the charges in the indictment. At the sentence-determining phase, the jury fixed Petitioner's punishment as death. The trial judge then sentenced Petitioner to death.

On July 5, 1983, the Alabama Court of Criminal Appeals affirmed Petitioner's death sentence, and rejected his claims of autrefois convict and former jeopardy under the Alabama and United States Constitutions. Larry Gene Heath v. State, No. 4 Div. 134 slip op. (Ala. Crim. App. July 5, 1983).

On July 6, 1984, the Alabama Supreme Court affirmed Petitioner's death sentence, and rejected his claims of autrefois convict and former jeopardy under the Alabama and United States Constitutions. Ex Parte: Larry Gene Heath, No. 82-1060 slip. op. (Ala. July 6, 1984).

REASONS FOR GRANTING THE WRIT

It should be noted that this Court has recently granted certiorari in Fugate v. New Mexico (No. 83-6663, October 1, 1984), where the Court has been asked to elaborate on the relationship between jurisdictional limitations and double jeopardy. For reasons below, this petition also presents questions concerning jurisdictional limitations and double jeopardy.

I.

WHEN THE STATE OF ALABAMA TRIED, CONVICTED AND SENTENCED PETITIONER TO DEATH FOR A MURDER THAT OCCURRED IN THE TERRITORIAL JURISDICTION OF THE STATE OF GEORGIA AND WHEN FOR THE SAME MURDER PETITIONER HAD ALREADY BEEN CONVICTED AND SENTENCED TO LIFE IMPRISONMENT BY THE STATE OF GEORGIA, THE STATE OF ALABAMA VIOLATED THE DOUBLE JEOPARDY CLAUSE AND THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.

The State of Alabama has tried and convicted Mr. Heath for a murder which apparently all parties concede occurred in Georgia. The indictment under which Mr. Heath was convicted in Georgia alleged that the murder of Rebecca Heath occurred on August 31, 1981, in Troup County, Georgia. The indictment under which Petitioner was convicted in Alabama alleged only that the murder had occurred prior to the date of the indictment , and did not allege the location of the commission of any element of the charged offense. Furthermore, the evidence of the State's witnesses at trial only supports the conclusion that the killing occurred in Georgia. The car in which the body was found in Georgia was left at the side of the road at 9:15 a.m. on August 31, 1981. Record at 334-9. A witness who saw a person in the back seat at 9:15 a.m. said the windows of the car were fogged on the inside, apparently because someone was breathing in the car. Id. When examined in the car at 11:15 a.m. the body was still extremely warm. Record at 348-57 (testimony of Chief Investigator of Troup County, Georgia Sheriff's Office).

By trying, convicting, and sentencing Petitioner for a crime which occurred in Georgia, and for which he had already been convicted and sentenced by the State of Georgia, Alabama placed Petitioner in jeopardy for a second time for the same offense, and therefore violated the Fifth Amendment's prohibition of double jeopardy. When a defendant has been punished for a particular crime, the principles of fairness and finality embodied in the double jeopardy clause require that he not be subjected to the possibility of further punishment by again being tried or sentenced for the same offense. United States v. Wilson, 420 U.S. 332, 343 (1975); Ex Parte Lange, 85 U.S. (18 Wall.) 163, 168 (1874). [1]

The State of Alabama would apparently justify its extraordinary attempt to exercise jurisdiction over the murder that occurred in Georgia on the ground that the activity leading to the killing of Rebecca Heath was done in part in Alabama. Such a remarkable abrogation of power flatly contradicts the limits of state sovereignty t[illegible]t upon which the nation's political structure is premised, and this Court should not

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1. The Georgia courts have obviously found that the killing occurred in Georgia, given Petitioner's indictment, conviction, and sentence. Cf. Owens v. State, 251 Ga. 313, 305 S.E.2d, 102 (Ga. 1983), and Lambert v. Jones, 250 Ga. 603, 299 S.E.2d 716 (1983), Both concerning the murder of Rebecca Heath). The principles reflected in the Full Faith and Credit Clause of the United States Constitution suggest that the Alabama prosecution should therefore have been barred. Furthermore, Petitioner's appeal raises the important question of the scope of the double jeopardy clause's requirement of collateral estoppel and related principles. Cf. Ashe v. Swenson, 397 U.S. 436 (1973). That the double jeopardy clause may require extension of collateral estoppel principles to prosecutions by different sovereigns has been suggested by the rulings of a number of courts. E.g., State v. Hogg, 118 N.H. 262, 266, 395 A 2nd 844, 846-7 (N.H. 1978); State v. O'Kelly, 211 N.W.2d 89, 593-5 (Iowa 1973); United States v. Addington, 471 F.2d 560, 566-8 (10th Cir. 1973). But cf. Standefer v. United States, 447 U.S. 10 (1980). This issue should be resolved by this Court given the importance of the question and the considerable conflict between various courts over the proper answer.

countenance the failure of the State of Alabama to respect the limits of its legitimate authority. No American State, prior to Alabama's effort to convict Mr. Heath, has claimed that it has universal criminal jurisdiction without regard for territorial boundaries. W. LaFave & A. Scott, Handbook on Criminal Law, 125, (1972). "It is fundamental that jurisdiction resides solely in the courts of the state or country where the crime is committed, and the laws of each state or country exclusively govern the nature of the offense." 21 Am. Jur. 2d Criminal Law, Sect. 343 (1981). Indeed, these principles are reflected in this Court's pronouncements that a state's penal laws will not be given extraterritorial effect by the courts of other jurisdictions. Huntington v. Attrill, 146 U.S. 657, 669, 671-3 (1892). In the case of Mr. Heath, the State of Alabama is claiming the right to try him free of these time honored limits on the scope of state authority. To allow the States of Alabama to do so would be to make a mockery of the right not to be placed in jeopardy twice for the same offense.

Mr. Heath is not presently contesting the jurisdiction of the State of Alabama over an allegation of kidnapping that may have occurred in Alabama, but it must be remembered that Mr. Heath was charged not with kidnapping but with the capital offense of murder during a kidnapping. According to the Alabama Supreme Court, which is the final arbiter on the meaning of Alabama law ". . . in order for the death sentence to be imposed . . . an intentional killing must be shown . . . The capital offenses set forth in Sect. 13A-5-31 contain an 'intentional killing,' the gravamen, and aggravation." Dobard v. State, 435 So.2d 1338 (Ala. 1983).[2] Thus, it is the killing that is the essence of

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2. It is true that Dobard concerned the immediate past codification of capital offenses in Alabama. However, an examination of the statutes reveals no material alteration. [footnote continues, next page]

> States and the National Government are separate political communities. State and Federal Governments '[derive] power from different sources,' each from the organic law that established it. United States v. Lanza, 260 U.S. 377, 382. Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other.' Ibid. And while the States, as well as the Federal Government, are subject to the overriding requirements of the Federal Constitution, and the Supremacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power."

The Supreme Court has never considered the question of the applicability, vel non, of the "dual sovereignty" doctrine to consecutive prosecutions by two states. It is clear that the "dual sovereignty" concept does not apply in every instance where successive cases are brought by separate entities. For instance, a state and a municipal subdivision of the same state cannot bring successive prosecutions for offenses arising out of the same conduct. Waller v. Florida, 397 U.S. 387 (1970). The states of Alabama and Georgia are clearly separate political sovereignties, however. If, for double jeopardy purposes, Alabama is considered to be a sovereign entity vis-a-vis the federal government then surely it is a sovereign entity vis-a-vis

this charge. That killing occurred in Georgia, and Alabama does not have jurisdict.. .ver it.[3]

If Alabama is allowed to treat the fourteen aggravating circumstances in its capital punishment statute as essential elements of the offense for jurisdictional purposes, ridiculous and unjust results can ensue. For example, Ala. Code Sect. 13A-5-40(a)(6) (1981) makes "murder committed while the defendant is under sentence of life imprisonment" a capital offense. Ala. Code Sect. 13A-5-40(a)(13) (1981) provides capital punishment for 'murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime." These aggravating circumstances would give Alabama jurisdiction over homicides committed anywhere in the world with no link between the crime and Alabama but some past act of the defendant unrelated to his present crime.

If a State may punish conduct outside its borders without limitation, and without regard for the question of whether such conduct has been prosecuted in the courts of the jurisdiction

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[Footnote 2, continued]
Indeed, in Ex parte Bush, 431 So.2d 563 (Ala. 1983), the Alabama Supreme Court held that a particular indictment mistakenly citing the 1975 capital offense statute rather than the next and current codification was a merely technical harmless error. Id. at 564-5, Alabama has interpreted its capital offenses as composed of the gravamen of murder plus an aggravating circumstance which is not the gravamen for the simple reason that crimes other than intentional killings cannot be punished with the death penalty. Ex parte Kyzer, 399 So.2d 330, 335 (1981). See Gregg v. Georgia, 428 U.S. 153 (1976).

3. That Alabama has overreached its criminal jurisdiction is supported by the reasoning of the Alabama Supreme Court in Baldwin v. State, 372 So. 2d 32 (Ala. 1979). The court there dealt with a robbery and abduction in North Carolina that culminated in a killing in Alabama. The court said,"although the offense was commenced in North Carolina, it was not consummated until Naomi Ronlon was killed in Monroe County, Alabama. The place where the crime was consummated is the place where the crime was committed and the place where the defendant may be tried. 21 Am. Jur. 2d Criminal Law Sect. 399, at 416.: Id. at 33. The court's language suggests that Alabama has adopted an inconsistent and unjustified theory of extraterritorial jurisdiction in Mr. Heath's case.

where it occurred, then the prohibition against double jeopardy will be gutted. Any conceivable nexus could be sued to obtain criminal jurisdiction, for example State residency of the alleged criminal, the victim, the victim's relatives or his or her friends. Transitory fortuities should not provide a basis for jurisdiction, particularly where the State in which the essential conduct occurred has already taken criminal jurisdiction of that conduct. This Court has never pronounced the limits which the Fifth and Fourteenth Amendments place upon a State's exercise of extraterritorial jurisdiction, yet if the Fifth Amendment's prohibition of double jeopardy and the proper operation of the Federal system are to be preserved, then it is vital that those limits be established. Certiorari should therefore be granted.

II.

THE CONCEPT OF DUAL SOVEREIGNTY DOES NOT PERMIT THE STATE OF ALABAMA TO TRY AND CONVICT AN INDIVIDUAL FOR THE SAME CONDUCT FOR WHICH HE HAD ALREADY BEEN CONVICTED AND SENTENCED BY THE STATE OF GEORGIA, WHEN THE CONDUCT IS NOT LEGALLY DISTINGUISHABLE AND SERVES IDENTICAL PURPOSES UNDER BOTH CAPITAL MURDER STATUTES, AND THUS ACTION BY THE STATE OF ALABAMA CONFLICTS WITH THIS COURT'S RATIONALE IN BROWN v. OHIO, 432 U.S. 161 (1977).

Even if it can be argued that Alabama had jurisdiction over Petitioner's case, the double jeopardy clause should preclude the exercise of that jurisdiction given that Petitioner has already been convicted and sentence by Georgia, the State where the murder occurred. It is one thing to have jurisdiction over a matter; it is another to exercise it properly. For example, this Court has stated that where two States exercise concurrent jurisdiction over a border river, only one State may actually bring a prosecution for a crime committed on the river. Nielsen v. Oregon, 212 U.S. 315, 320 (1909) (dictum). Concurrent jurisdiction in such situations ensures that difficulties of

proving territorial jurisdiction do not allow a criminal to evade prosecution. But once one of the two States has brought a prosecution the interests of the defendant that are reflected in the double jeopardy clause exceed any interest of the second State in bringing a second prosecution.

Similarly, in Brown v. Ohio, 432 U.S. 151 (1977), the defendant committed the offense of theft and operation of a car in the cities of Wickliffe and East Cleveland. Either city could have prosecuted the defendant. The Wickliffe officials proceeded first, charging the defendant with joyriding, a lesser included offense of theft and operation of a car. Subsequently, East Cleveland officials charged the defendant with auto theft. This court held that the second charge violated defendant's double jeopardy rights. Even though the offense had occurred in both jurisdictions, the defendant could only be tried for it once.

Brown v. Ohio, is applicable to this case. Even if Alabama and Georgia both had jurisdiction over the killing of Rebecca Heath, once Georgia exercised that jurisdiction Alabama was precluded from doing so. Thus, this Court should grant certiorari in order to vindicate Mr. Heath's double jeopardy rights.

This conclusion is further supported by a consideration of the concept of dual sovereignty. [4] Although Petitioner's research has not revealed any Federal case on the question of the applicability of dual sovereignty theory to successive State prosecutions, an analysis of this Court's dual sovereignty cases results in the conclusion that the concept of dual sovereignty

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4. The following cases in this Court have cast doubt upon the continuing vitality of dual sovereignty theory: Elkins v. United States, 364 U.S. 206 (1960); Murphy v. Waterfront Commission, 378 U.S. 52 (1964); Benton v. Maryland, 395 U.S. 784 (1969); Ashe v. Swenson, 397 U.S. 436 (1973). However, the theory need not be rejected to be found inapplicable to the present case.

should not be extended to situations comparable to the present case. Given the significance of the issues raised by this case it is vital that this Court grant certiorari to provide guidance in this area.

In Bartkus v. Illinois, 359 U.S. 121, reh'g denied, 360 U.S. 907 (1959), the Court ruled by a five to four vote that an Illinois conviction for armed robbery which followed a Federal acquittal on the charge of robbing a Federally insured savings and loan association did not violate due process. In large measure this conclusion was seen as a necessary corollary of federalism, yet that concern militates against the extension of the dual sovereignty rule to prosecutions by two States, for such prosecutions, if they truly arise out of the same conduct, inevitably involve the interference by at least one State in conduct occurring within territorial boundaries of another. Moreover, such an occurrence is analogous to the situation in Brown v. Ohio, where it was concluded that only one of two governmental units of equal stature could exercise jurisdiction over a single offense.

Another justification for the result in Bartkus was that the separate prosecutions in Bartkus served different interests. The federal prosecution served to protect the federal banking scheme and the state prosecution served the state interest in preserving law and order. In the case of Mr. Heath, however, there are absolutely no distinct interests served by the Alabama prosecution.[5] Thus, dual sovereignty should not be interpreted to allow multiple prosecutions of Mr. Heath for the same offense where the only value served by such a prosecution is the evisceration of the double jeopardy clause.

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5. The State has never denied that, at least as applied to the present case, the statutes are identical as to law and fact. See e.g., the State's brief before the Alabama Supreme Court at 20-1.

If the State of Alabama is allowed to proceed on the theory of dual sovereignty in the present case, then it is difficult to see what limit the double jeopardy clause will place upon prosecutions egregiously violating the principles which underlie this fundamental constitutional provision. The State of Alabama has suggested no delimitation of the necessary nexus between a crime and a State for that State to punish that crime. Even setting aside any suggestion that the State of Alabama has overreached its territorial jurisdiction, the fact remains that the State cannot identify a valid interest served by its prosecution that was not served by that brought in the State of Georgia.[6] Without such interests existing, multiple prosecutions under the rhetoric of "dual sovereignty" ought not to be allowed. Accordingly, this Court should grant certiorari in order to clarify the scope of "dual sovereignty" and to vindicate Mr. Heath's rights.

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6. To allow such a prosecution simply to give the State of Alabama a chance to raise Petitioner's penalty from life imprisonment to a death sentence is hardly a compelling rationale, and is profoundly inconsistent with the basic principles underlying the prohibition of double jeopardy. Commonwealth v. Mills, 447 Pa. 163, 171, 286 A.2d 638, 641 (1971); Turley v. Wyrick, 554 F.2d 840, 843 (8th Cir. 1977) (Lay, J., Concurring). Cf. Arizona v. Rumsey, 104 S.Ct. 2305 (1984). In vindictiveness cases, such a result is sufficient to trigger a presumption of improper motive, even where different prosecutors are involved. Thigpen v. Roberts, 104 S.Ct. 2917, 2919 (1984).

III.

WHEN THE STATES OF ALABAMA AND GEORGIA CLOSELY COOPERATED IN THE INVESTIGATION AND PREPARATION OF THE MURDER CASE AGAINST PETITIONER, THE ALABAMA PROSECUTION OF THE MURDER WHICH FOLLOWED THE DISPOSITION OF THE SAME MURDER CHARGES BY THE STATE OF GEORGIA VIOLATES THE DOUBLE JEOPARDY CLAUSE AND THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The fact that the State of Alabama did not seek to indict Petitioner until after the conclusion of the Georgia prosecution is disturbing. The State of Georgia apparently wanted and thought Petitioner would testify against other persons allegedly involved in Rebecca Heath's murder. Record at 23-6. Petitioner refused to do so. Id. His prosecution in Alabama commenced thereafter.

The two States cooperated very closely in the investigation and preparation of the case against Petitioner. See e.g., Record at 308-9 (opening statement of prosecution describing some of the cooperation between Georgia and Alabama law enforcement personnel); Record at 251-3, 366-7 (testimony of Sheriff of Russell County, Alabama, as to cooperation with Sheriff's Department of Troup County, Georgia); Record at 372, 383-5, 386, 387-90 398-9 (testimony of chief investigator, Sheriff's Department of Russell County, Alabama, including statement that investigations by Russell County investigation and cooperation with Troup County, Georgia Sheriff's Department led to the Georgia indictment).

The extent of the cooperation between the two sovereigns in this case may well run afoul of the double jeopardy prohibition despite the dual sovereignty theory. United States v. Aboumoussallem, 726 F.2d 906, 910 (2nd Cir. 1984); Bartkus v. Illinois, 359 U.S. 121, 122-4, reh'g denied, 360 U.S. 907 (1959). Such cooperation makes the fiction of prosecution for different offenses all the more tenuous, and becomes the cooperation of two sovereigns to deny an individual the protection of the Fifth

Amendment's prohibition of double jeopardy. Such whipsawing is certainly repugnant. Cf. Murphy v. Waterfront Commission, 378 U.S. 52 (1964) (actions of two sovereigns in combination may violate Fifth Amendment's prohibition of coerced self-incrimination).

The point at which cooperation between two sovereigns becomes so great as to make the dual sovereignty theory inapplicable and therefore to violate the prohibition against double jeopardy is another important issue raised by this case, and is therefore an additional reason for the Court to grant certiorari.

IV.

WHEN THE STATE OF ALABAMA SENTENCED AN INDIVIDUAL TO DEATH FOR A MURDER FOR WHICH THAT INDIVIDUAL HAD ALREADY RECEIVED A SENTENCE OF LIFE IMPRISONMENT FROM THE STATE OF GEORGIA, THAT DEATH SENTENCE VIOLATES THE CONSTITUTIONAL PRINCIPLES ENUNCIATED IN BULLINGTON v. MISSOURI, 451 U.S. 430 (1980), AND ARIZONA v. RUMSEY, 104 S.Ct. 2305 (1984).

Petitioner was indicted for murder in Georgia under Ga. Code Ann. §26-1101 [OCGA §16-5-1]. That section reads as follows:

> §26-1101 Murder; felony murder.
>
> (a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

After indicting the Petitioner, the State of Georgia served notice of aggravating circumstances, thereby advising Petitioner of its intention to seek the death penalty. Ga. Code Ann. §27-2534.1(b)(6) [OCGA §17-10-30(b)(6)]. Petitioner eventually pleaded guilty and was sentenced to life imprisonment. The State has tried, convicted and sentenced the Petitioner to death for the same murder.

In Bullington v. Missouri, 451 U.S. 430 (1980), this Court ruled that a sentence of death after a defendant's retrial, where

that defendant had received a sentence of life imprisonment at his first trial, violated the prohibition against double jeopardy. This Court emphasized that the nature of the Missouri capital sentencing proceeding made it comparable for double jeopardy purposes to a trial on guilt or innocence; in effect, the defendant had at his first trial been acquitted of the death penalty.

Similarly, in Arizona v. Ramsey, 104 S.Ct. 2305 (1984), the trial judge had imposed a sentence of life imprisonment, after conducting a death penalty hearing. The State supreme court ruled that the trial judge had incorrectly defined one aggravating circumstance too narrowly at the hearing, and remanded the case to the trial judge for a second determination of whether to sentence the defendant to death. This Court held that this procedure violated the principles enunciated in Bullington.

This Court has emphasized the anxiety and ordeal suffered by the defendant as the essence of the harm which the Constitution seeks to avert in such cases. Arizona v. Rumsey, 102 S.Ct. 2305, 2310 (1984). Petitioner was indicted and served with notice of an aggravating circumstance by the State of Georgia. He received a sentence of life imprisonment, which amounts under Bullington to an acquittal as to any sentence of death. Subsequently, the State of Alabama sought and received a death sentence of Petitioner for the same murder.[7] Surely, this is what the

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7. This conclusion does not depend upon rejection of the dual sovereignty theory. The actions of two sovereigns may in combination violate provisions of the Constitution. Murphy v. Waterfront Commission, 378 U.S. 52 (1964) (self-incrimination clause of Fifth Amendment).

Constitution forbids. Petitioner has twice been placed in jeopardy of life for the same offense.[8] This Court should grant certiorari to establish whether such a procedure violated the double jeopardy clause.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Alabama Supreme Court.

Respectfully submitted,

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8. It is also disturbing that the Alabama Court of Criminal Appeals seems to rely upon aggravating circumstances rejected by the trial court in reviewing the imposition of a death sentence. Cf. Larry Gene Heath v. State, No. 4 Div. 134 slip op. at 4-5 (Ala. Crim. App. July 5, 1983); Ala. Code §13A-5-53 (b)(2) (1981). If this is true, it raises double jeopardy problems, cf. Arizona v. Rumsey, 104 S.Ct. 2305 (1984), and vindictiveness problems, cf. North Carolina v. Pearce, 395 U.S. 711 (1969).

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LARRY GENE HEATH,

Petitioner,

v.

STATE OF ALABAMA,

Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF ALABAMA

APPENDIX A

Opinion of Alabama Supreme Court in
Ex Parte: Larry Gene Heath,
___ So.2d ___ (Ala. July 6, 1984)

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1984

Ex parte: Larry Gene Heath

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS

(Re: Larry Gene Heath

82-1060 v.

State of Alabama)

FAULKNER, JUSTICE.

The petitioner was convicted of murder during a kidnapping in violation of § 13A-5-40(a)(1), Code of Alabama, and was sentenced to die. The Court of Criminal Appeals reviewed the petitioner's conviction and, after independently determining that

the death penalty was appropriate, affirmed his conviction and sentence. Heath v. State, [4 Div. 134, July 5, 1983] ___ So. 2d ___ (Ala. Crim. App. 1983). We granted certiorari pursuant to A.R.A.P. 39(c).

The facts are set out in detail in exhibit A to the opinion of the Court of Criminal Appeals. In short, Heath hired two men to abduct and murder his wife. After she was kidnapped and shot, her abductors abandoned her body in Georgia. Heath pleaded guilty to murder charges brought in Georgia and was sentenced to life in prison.

In his appeal to the Court of Criminal Appeals and in his petition to this Court, Heath raised only one issue, whether Alabama was prohibited by the double jeopardy provisions of the United States and the Alabama Constitutions from prosecuting Heath for his wife's murder after his murder conviction in Georgia arising out of the same incident. United States Constitution, Amendment V.; Alabama Constitution Art. 1, § 9.

We agree with the Court of Criminal Appeals that the Double Jeopardy Clause of the Fifth Amendment and the double jeopardy clause of the Alabama Constitution each applies only to offenses against the same sovereign and, therefore, that the subsequent prosecution in Alabama was not barred. Prosecutions under the laws of separate sovereigns do not improperly subject an accused twice to prosecutions for the same offense. United States v. Wheeler, 435 U.S. 313, 317 (1978). Thus, a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts on which the federal prosecution was based; nor does a prior state prosecution bar a federal one. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). As the Supreme Court stated in United States v. Walker, 435 U.S. at 320:

> "Bartkus and Abbate rest on the basic structure of our federal system, in which

the state of Georgia.

Alabama may choose not to prosecute individuals in situations like the one at bar where the defendant has been convicted of a serious offense and has received a substantial sentence in another state for an offense arising out of an act punishable under Alabama law. Such an exercise of prosecutorial restraint is not constitutionally mandated, however, and we decline to impose such a policy judicially under the guise of a constitutional pronouncement. See Booth v. State, 436 So. 2d 36 (Fla. 1983). Such a rule would have the undesirable effect of depriving Alabama of the right to enforce its own laws in instances where another state has prosecuted an individual for an offense arising out of the transaction in question, even where the prosecution in another state is for a relatively minor offense.

After reviewing the record and considering the petition, the arguments of the parties, and the opinion of the Court of Criminal Appeals, we are of the opinion that the judgment of the court below affirming the conviction and death sentence is due to be affirmed.

AFFIRMED.

Torbert, C.J., Maddox, Jones, Almon, Shores, Embry, Beatty, and Adams, JJ., concur.

APPENDIX B

Relevant Georgia and Alabama Statutory Provisions

Ga. Code Ann. §26-1101

[OCGA §16-5-1]

Murder; felony murder.

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

Ga. Code Ann. §27-2528

[OCGA §17-10-32]

Sentence to life imprisonment or lesser punishment by judge on plea of guilty to an offense punishable by death

Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, sentence the person to life imprisonment or to any other punishment authorized by law for the offense named in the indictment; provided, however, that the judge must find one of the statutory aggravating circumstances provided in Code Section 17-10-30 before imposing the death penalty, except in cases of treason or aircraft hijacking. (Acts 1956, p. 737; 1973, pp. 159, 171).

Ga. Code Ann. 27-2534

[OCGA §17-10-30]

Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another for the purpose of receiving money or another thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of a death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, §27-2534.1, enacted by Ga. L. 1973, p. 159, §3).

Alabama Code §13-5-4(a)

Capital offenses.

(a) The following are capital offenses:

(1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

(3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant;

(4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;

(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Murder committed while the defendant is under sentence of life imprisonment;

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant;

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosions;

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct;

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity;

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction; and

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

APPENDIX A

6 JUL

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

4 Div. 134

Larry Gene Heath

v

State

Appeal from Russell Circuit Court

BOWEN, PRESIDING JUDGE

In August of 1981, Rebecca McGuire Heath was nine months pregnant. In that same month, she was kidnapped from her home in Russell County, Alabama, and executed by a single gunshot wound to her head. Her body was discovered in Troup

County, Georgia. Her executioners had been hired by her husband, the defendant, for the sum of $2000.

The defendant was indicted for murder during a . . . kidnapping in the first degree in violation of Section 13A-5-40(a)(1), Code of Alabama 1975. At the guilt-finding phase of his trial, a jury found the defendant guilty as charged in the indictment. At the sentence-determining phase, the jury fixed the defendant's punishment at death. The trial judge then held the hearing mandated by Section 13A-5-47, found that the aggravating circumstance outweighed the mitigating circumstance and sentenced the defendant to death. The written findings of the trial court are attached to this opinion as Exhibit A. The trial and sentencing proceedings were conducted in accordance with Beck v. State, 396 So.2d 645 (Ala. 1981), and Beck v. Alabama, 447 U.S. 625 (1980). One issue is presented on appeal.

I

The defendant's sole contention on appeal is that his pleas of autrefois convict and former jeopardy were due to be granted. The defendant pled guilty to his wife's murder before the Superior Court of Troup County, Georgia, in February of 1982. He was sentenced to life imprisonment. The defendant argues that this prior Georgia conviction should have barred his subsequent trial and conviction in Alabama for the same criminal conduct.

The double jeopardy clauses of both the Fifth Amendment to the Constitution of the United States and Section 9, Art. I, of the Alabama Constitution, provide that no person shall "for the same offense" be twice put in jeopardy of life or limb. Consequently,

> "A plea of former jeopardy is unavailing unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea. And this is true even if both cases are founded on the same facts but the crimes

charged were not the same in law."
Racine v. State, 291 Ala. 684, 687
286 So.2d 896 (1973).

The doctrine of dual sovereignty provides that, "in the absence of a statute, the rule against double jeopardy applies only to offenses against the same sovereignty." 22 C.J.S. Criminal Law, Section 296 (1961). Barnett v. State, 373 So.2d 1226 (Ala.Crim.App. 1979), cert. denied, 373 So.2d 1230 (Ala. 1980). The United States Supreme Court has recognized this doctrine in holding that a single act may constitute an offense against both state and federal governments [illegible] the offender may be prosecuted by both governments. [illegible]obate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). Also recognizing the principle that a person convicted in a state court may subsequently be prosecuted for the same act in federal court are United States v. Wheeler, 435 U.S. 313 (1978); Waller v. Florida, 397 U.S. 387 (1970), rehearing denied, 398 U.S. 914 (1970); United States v. NG, 699 F.2d 63 (2nd Cir. 1983); Pope v. [illegible]ne, 671 F.2d 298 (8th Cir. 1982), cert. denied, ____ U.S. ____, 102 S.Ct. 2974 (1982); Brown v. United States, 551 F.2d 619 (5th Cir. 1977).

We have been cited to no federal case involving jeopardy and multiple state prosecutions. However, the courts of various states have recognized that a single act may constitute offenses against two different states and therefore prosecution in both states is constitutionally permissible under the principle of dual sovereignty. People v. Walker, 177 Cal.Rptr. 147 (Dist.Ct.App. 1981); State v. Booth, 418 So.2d 385 (Fla.App. 1982); State v. Brown, 441 N.E.2d 1126 (Ohio App. 1981); State v. Straw, 626 S.W.2d 286 (Tenn.Crim.App. 1981); State v. Glover, 500 S.W.2d 271 (Mo. App. 1973).

In Hare v. State, 387 So.2d 299, 300 (Ala.Crim. App. 1980), this Court held that such dual prosecutions are permitted.

> "'A conviction in one state for an act in violation of its laws is not a bar to a prosecution in another for the same act, if it violates the laws of the latter state, unless it is otherwise provided by statute, or unless by compact between the states it has been agreed that the jurisdiction shall vest exclusively in the state first apprehending and arresting accused.' 22 C.J.S. Criminal Law, Section 296(c) (1961)."

In the absence of any statutory exception to the dual sovereignty doctrine, see Barnett, supra, we adhere to the principle stated in Hare, supra, and find no error in the denial of the defendant's pleas of former jeopardy.

II

We have fulfilled our statutory duty and searched the record for error affecting any substantial right of the defendant but have found none. Alabama Code Section 12-22-241 (1975); A.R.A.P. 45A.

We now review the propriety of the death sentence as required by Section 13A-5-53, Code of Alabama 1975. We have reviewed the sentencing proceedings and find therein no error adversely affecting the rights of the defendant. The trial court's finding of the aggravating and mitigating circumstances is supported by the evidence. The only aggravating circumstance relied on (the capital offense was committed while the defendant was an accomplice in the commission of a kidnapping, Section 13A-5-49(4)) was established by the verdict of conviction itself. This was proper under Section 13A-5-50, Code of Alabama 1975.

Explicitly addressing each of the three questions specified in Section 13A-5-53(b), we find that death is the proper sentence in this case.

(1) Under Section 13A-5-53(b)(1), there is no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. The trial court instructed the jury in its oral charge in the sentencing hearing not to let any sympathy, bias, passion, or prejudice affect their deliberations or sentence verdict. In the absence of any evidence to the contrary, we must assume

that the jurors followed these instructions. Marshall v. Lonberger, 51 U.S.L.W. 4113, 4116, n. 6 (U.S. February 22, 1983); Parker v. Randolph, 442 U.S. 62, 73 (1979).

(2) Our independent weighing of the aggravating and mitigating circumstances required by Section 13A-5-53(b)(2) indicates that death is the proper sentence. The record discloses the chronicle of a murder deliberately planned and engineered. The defendant overcame every obstacle in his path to insure the consummation of his wicked scheme. In consideration of the evidence presented, we do not see how the jury could have returned any verdict but that of guilty with a punishment of death.

In consideration of the third factor in determining whether the death sentence was proper, Section 13A-5-53(b)(3), we find that the sentence of death is neither excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See Williamson v. State, 370 So.2d 1054 (Ala.Crim.App. 1978), affirmed, 370 So.2d 1066 (Ala. 1979) vacated and remanded on other grounds, 448 U.S. 903 (1980).

In reviewing this factor, we have considered the punishments and convictions of the defendant's accomplices in the State of Georgia. Each accomplice was indicted for murder during kidnapping first degree. The defendant's girlfriend, Denise Paige Lambert,pled guilty to conspiracy to commit murder and was sentenced to ten years' imprisonment. Sanders Williams, who was hired to commit the murder but disappeared after several attempts "fell through", also pled guilty to conspiracy to commit murder and received a ten-year sentence.

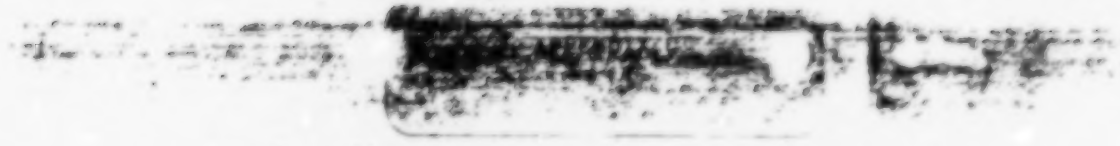
Jerry Heath, the defendant's brother, who allegedly furnished the defendant with the name of someone who would commit the murder, was tried and acquitted. The two hired

assassins, Charles Edward Owens and Gregory Hughes Lumpkin, were convicted of murder and received life sentences.

Our review of the entire record convinces us that the judgment of the circuit court is due to be and it is hereby affirmed.

AFFIRMED.

All Judges Concur.



Court of Criminal Appeals, No. 4th Div. 134 Russell County Circuit Court
Case No. C-82-392

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

LARRY GENE HEATH,

Appellant

vs.

STATE OF ALABAMA,

Appellee

APPEALED FROM THE CIRCUIT COURT OF

RUSSELL COUNTY, ALABAMA

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P. O. Box 128, 516 - 14th Street
Phenix City, Alabama 36867-0002
ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

On April 29, 1982, a warrant for the arrest of the Appellant, Larry Gene Heath, was issued in Russell County, Alabama on a charge of Murder During Kidnapping First Degree of Rebecca McGuire Heath. During the Spring term, 1982 of the Russell County Grand Jury, the Appellant was indicted on a charge of Murder During Kidnapping First Degree of Rebecca Heath. On May 5, 1982, a Writ of Arrest was issued against the Appellant on a charge of Murder During Kidnapping First Degree. Appellant was returned from the State of Georgia where he was incarcerated, serving a life sentence from Troup County, Georgia for the murder of Rebecca Heath. On October 19, 1982, the Court appointed Counsel to represent the Appellant because of his indigent status and on October 20, 1982, the Appellant was arraigned and a plea of not guilty was entered. On November 2, 1982, a plea of autrefois convict and plea of former jeopardy was entered by Counsel for the Appellant by his Court appointed Counsel. On November 3, 1982, the Court set a hearing on the plea of former jeopardy and plea of autrefois convict. On November 4, 1982, a motion for Court to grant and approve expenses by defense attorneys, motion to obtain venue where impartial Jury can be obtained, plea to jurisdiction, and motion to suppress were filed by defense Counsel for the Appellant. On November 5, 1982, the Court set a hearing on the motion to suppress, plea to jurisdiction, motion for change of venue, and motion for approval of expenses of defense attorneys. On December 7, 1982 a Brief in support of plea of autrefois convict and plea of former jeopardy was filed by defense Counsel.

A hearing was held by the Court and the Court overruled and denied the plea of former jeopardy, and plea of autrefois convict and reserved

ruling on the plea of jurisdiction, motion to suppress and motion for change of venue until the trial of the case. The Court further set a final hearing on Appellant's motion for approval of expenses for December 21, 1982 and set the date for the trial on the indictment for the 10th day of January, 1983. On December 13, 1982, the Court amended its previous Order by reserving a ruling on the plea of jurisdiction until the close of the State of Alabama's case-in-chief in the trial of the case. On December 15, 1982, Appellant filed a motion to produce various evidence and documents to be used by the State of Alabama in the trial of the case. On December 16, 1982, the Court Ordered a hearing upon the motion to produce. On December 16, 1982, the Court authorized expenses for Court cost and the appointment of Counsel to file and represent the Appellant on a Petition For Writ of Habeas Corpus. On December 22, 1982, the Court Ordered the State of Alabama to provide a list of witnesses that it intended to have at the trial in this case and made rulings on other phases of the motion to produce and approval of expenses.

On December 28, 1982, Appellant filed a motion for continuance to allow Counsel for Appellant to prepare for hearing on the Petition For Writ of Habeas Corpus and in the event of an adverse ruling, to perfect an appeal to the Alabama Court of Criminal Appeals, prior to trial of this case which was set for January 10, 1983. On December 28, 1982, the motion for continuance of the trial of this case was overruled and denied by the Court. On January 3, 1983, the State of Alabama filed its answer to Order on the Defendant's motion to produce listing witnesses and exhibits to be used at trial.

On January 11, 1983, Appellant refiled his plea of autrefois convict,

plea of former jeopardy and brief in support of plea of autrefois convict and former jeopardy in open Court. Appellant was put to trial on the charge of Murder During Kidnapping First Degree of Rebecca Heath and on January 12, 1983, the Jury found the Appellar guilty of Murder During Kidnapping in the First Degree, as charged in the indictment and the Court Ordered a sentence hearing with participation by the Jury to be held on January 13, 1983. On January 13, 1983, the Jury determined that the one or more aggravating circumstances outweigh the mitigating circumstances, and recommended the punishment of the Appellant at death. On January 24, 1983, the Court Ordered that a pre-sentence investigation report be made on the Appellant and set a hearing on February 9, 1983 to take evidence on any part of the report and present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in this case. On February 2, 1983, the parole and probation officer filed a report of pre-sentence investigation. On February 10, 1983, the Court entered an Order of sentencing wherein the Appellant was sentenced to death by electrocution on the 17th day of March, 1983 and further suspended said sentence pending appeal.

On February 10, 1983 a death warrant was issued by the Clerk of the Circuit Court of Russell County, Alabama and the Court entered a determination of sentence by the Court setting forth findings of fact in the guilt phase of the trial and findings from the sentencing phase of the trial. On February 10, 1983, Appellant filed a notice of appeal to the Court of Criminal Appeals. On February 15, 1983, the Court Ordered that Counsel be appointed to represent the Appellant on appeal and suspended the sentence pending appeal.

STATEMENT OF THE ISSUES

I.

DID THE COURT ERR IN OVERRULING AND DENYING APPELLANT'S PLEA OF AUTREFOIS CONVICT AND PLEA OF FORMER JEOPARDY, THUS DEPRIVING APPELLANT OF HIS FIFTH AMENDMENT RIGHT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9, RIGHT OF THE ALABAMA CONSTITUTION?

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Green v. United States
Hare v. State
Baldwin v. State
Clark v. State
Burton v. State
North Carolina v. Pearce
Petite v. U.S.
Rinaldi v. U.S.
Missouri v. Hunter
U.S. Constitution, Fifth Amendment
Alabama Constitution, Article I, Section Nine
Title 13A, Section 13A-5-40(a)(1) Code of Alabama, 1975
Title 13A, Section 13A-5-41 Code of Alabama, 1975
Title 13A, Section 13A-6-2(a) Code of Alabama, 1975

STATEMENT OF THE FACTS

Rule 28 of the Alabama Rules of Appellate procedure provides, in pertinent part, that "[t]he brief of the Appellant shall contain ... [a] full statement of the facts relevant to the issues presented for review...". Compliance with the foregoing statutory requirement mandates review and analysis of Trial Court's conduct, inasmuch as the sole issue presented herein is the denial by the Trial Court of the Appellant's plea of autrefois convict and plea of former jeopardy in violation of Appellant's constitutional rights prohibiting double jeopardy. Thus the facts constituting the offense of which the Appellant was convicted are of marginal significance only to the extent that they enable the Court to assess the error committed by the Trial Court.

In the case Sub Judice, the Appellant has been subjected to double punishment for the murder of his wife, Rebecca Heath, in violation of his constitutional rights prohibiting double jeopardy.

Larry Gene Heath was indicted at the November, 1981 term of the Grand Jury of the Superior Court of Troup County, Georgia for the murder of his wife, Rebecca Heath, and was put to trial on said charge of murder.

On the 10th day of February, 1982, after negotiations between Counsel for the Appellant and the District Attorney of Troup County, Georgia, Larry Gene Heath entered a plea of guilty to the charge of murder of his wife, Rebecca Heath and was sentenced to life imprisonment. (R-735-754)

At the Spring Term, 1982, of the Grand Jury of the Circuit Court of Russell County, Alabama, Larry Gene Heath was indicted for murder during kidnapping first degree, of his wife, Rebecca Heath. (R-728-729)

Larry Gene Heath filed a plea of autrefois convict and a plea of former jeopardy on November 2, 1982. (R-735-754)

On December 7, 1982, Appellant filed a brief in support of plea of autrefois convict and plea of former jeopardy. (R-769-773)

On December 10, 1982, the Trial Court overruled and denied the plea of autrefois convict and the plea of former jeopardy. (R-774-777)

On January 10, 1983, Appellant was put to trial on the charge of Murder During Kidnapping First Degree of his wife, Rebecca Heath and on January 12, 1983, the Appellant was found guilty of Murder During Kidnapping First Degree. (R-81v)

On January 13, 1983, the Jury found that the aggravating circumstances out-cighed the mitigating circumstances and recommended the punishment of the Appellant at death. (R-821)

A pre-sentence hearing was held by the Trial Court on February 9, 1983 and on February 10, 1983, the Trial Court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced the Appellant to death by electrocution on the 17th day of March, 1983 and suspended said sentence pending appeal. (R-834-845)

On February 10, 1983, the Appellant filed a notice of appeal to the Court of Criminal Appeals.

[redacted]

ARGUMENT

THE TRIAL COURT DID ERR IN OVERRULING AND DENYING APPELLANT'S PLEA OF AUTREFOIS CONVICT AND PLEA OF FORMER JEOPARDY, THUS DEPRIVING APPELLANT OF HIS FIFTH AMENDMENT RIGHT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9, RIGHT OF THE ALABAMA CONSTITUTION.

The indictment by the Russell County, Alabama Grand Jury charges the Appellant with Murder During Kidnapping First Degree in violation of Title 13A, Section 13A-5-40(a)(1) Code of Alabama, 1975 which states that:

"The following are capital offenses: (a)(1) Murder by the Defendant during a kidnapping in the first degree or an attempt thereof committed by the Defendant".

Title 13A, Section 13A-5-41 provides that subject to 13A-1-9-(b) the Jury may find a Defendant indicted for a crime defined in Section 13A-5-40 (a) not guilty of the capital offense but guilty of a lesser included offense or offenses. Lesser included offenses shall be defined as provided in Section 13A-1-9(a), and when there is a rational basis for such a verdict includes but are not limited to murder as defined in Section 13A-6-2(a), and accompanying other felony, if any, in the provisions Section 13A-5-40(a) upon which the indictment is based.

Murder is defined in Title 13A, Section 13A-6-2(a) as follows:

"A person commits the crime of murder if:

(3) He commits or attempts to commit kidnapping in the first degree. and, in the course of and in furtherance of the crime that he is committing or attempting to commit or in immediate flight therefrom, he, or another participant if there be any, causes the death of any person.

(c) Murder is punishable by imprisonment in the penitentiary for not less than ten years to life; provided, that the punishment for murder or any offense committed under aggravated circumstances, as provided by Article II of Chapter 5 of this Title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by Article II of Chapter 5 of this Title or any amendment thereto."

The Appellant contends that murder is a lesser included offense of murder during kidnapping first degree under the laws of the State of Alabama and also, that the offense of murder is a lesser included offense of murder caused and directed by the Appellant under the laws of the State of Georgia.

Appellant further contends that his constitutional rights were violated when the State of Alabama prosecuted him for murder during kidnapping first degree of his wife, Rebecca Heath, after he had been prosecuted and convicted and sentenced to life imprisonment for murder caused and directed by the Appellant under the laws of the State of Georgia in the case which was completed in Troup County, Georgia Superior Court on February 10, 1982. The State standard or test for double jeopardy is clearly set out in the case of Baldwin v. State 47 Ala. App. 136, 251 So.2d. 633 (1971) wherein the Court said:

"The established test of which a plea of former jeopardy must be subjected is, whether the facts averred in the second indictment, if found to be true, would have warranted a conviction upon the first indictment. In other words, in determining whether both indictments charge the same offense, the test generally applied is that when the facts necessary to convict on the second prosecution would necessarily have convicted on the first, a final judgment on the first prosecution will be a bar to the second.

If the minor offense is embraced within the major one, as a constituent element or component part of it, and on the trial of the one there can be a conviction of the other, then a former conviction or acquittal of the minor will bar the major."

Under State law in the case of Clark v. State, 294 Ala. 485, 318 So. 2d. 805 (1974) Cert. denied, 423 U.S. 937, 96 S. Ct. 298, 46 L. Ed. 2d. 270 (1975), the Court said:

"When one is tried under an indictment charging murder in the first degree, and is found guilty of a lesser included homicide, such findings is an acquittal of murder in the first degree, and such acquittal may be pleaded as a bar to the higher charge of murder in the first

degree in the event of a second trial on the indictment, if the Defendant so desires."

In the case of Burton v. State, 115 Ala. 1, 22 So. 585 (1897), the Court said:

"A conviction of manslaughter is an acquittal of murder based upon the same evidence."

The Court further said in Baldwin v. State, that:

"A series of criminal charges cannot be based on the same offense or criminal act, at least, as concerns the dignity of the same sovereignty."

"A prosecution for any part of a single crime bars any further prosecutions based upon the whole or a part of the same crime."

"If the State elects, through its authorized officers, to prosecute a crime in one of its phases, or aspects, it cannot afterwards prosecute the same criminal act under color of another name."

Under Article I, Section 9, of the Alabama Constitution, double jeopardy is prohibited. The double jeopardy issue arose in the case of Hare v. State, 387 So.2d. 299 (1980), wherein the Court of Criminal Appeals of Alabama held:

"That conviction of Defendant of burglary in Tennessee would not, on theory former jeopardy, prevent him from being tried or convicted for possession of controlled substances in Alabama, even if he obtained the substances in the burglary."

The Court further says:

"Even if the Defendant proved the allegations of his plea, the conviction of burglary in Tennessee would not prevent the Defendant's trial or conviction for possession of controlled substances in Alabama. These crimes are not the same in law in fact and therefore will not support a plea of former jeopardy."..... Moreover, even if the crimes where the same,

"A conviction in one State for an act in violation of its laws is not a bar to a prosecution in another State for the same act, if it violates the laws of the latter state, unless it is otherwise provided by statute, or unless by compact between the States it has been agreed that jurisdiction shall vest exclusively in the State first apprehending and arresting accused."

Appellant contends that the decision of Hare v. State, clearly abolishes the protection afforded by the Fifth Amendment of the U.S. Constitution and Article I, Section 9, of the Alabama Constitution which prohibits double jeopardy prosecutions and the Hare case should be reversed.

The United States Supreme Court set forth the nature of the guarantee against double joepardy, in the case of Benton v. Maryland, 395 U.S. 784, 23 L.E.D. 2d. 707, 89 S. Ct. 2056 (1969) wherein the Court said:

"The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this nation's independence. See Bartkus v. Illinois, 359 U.S. 121, 151-155, 3 L. E.D. 2d. 684, 705-707, 79 S. Ct. 676 (1959) (Black J. dessenting). As with many other elements of the common law, it was carried into the jurisprudence of this country through the medium of Blackstone, who codified the doctrine in his commentaries. "The plea of autrefois acquit, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense." Today, every state incorporates some form of prohibition in its constitution or common law. As this Court put it in Green v. United States, 355 U.S. 184, 187-188, 2 L. E.D. 2d. 199, 204, 78 S. Ct. 221, 61 A. L. R. 2d. 1119 (1957), "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as inhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly "fundamental to the American scheme of justice."

Further, in the case of Benton v. Maryland, the Supreme Court, held:

"That the double jeopardy clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment."

Further, Article I, Section 9 of the Alabama Constitution prohibits double jeopardy prosecutions by the State of Alabama.

As articulated in North Carolina v. Pearce, 395 U.S. 711 (1969), the double jeopardy prohibition secures at least three interests.

"It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." Id. at 717

Allowing either a State or the Federal government to prosecute an individual after the other jurisdiction has tried him for the same act appears to infringe these three concerns which the double jeopardy clause is designated to protect. Under the theory of dual sovereignty, successive Federal and State prosecutions have been permitted, however, double jeopardy law may have changed since the decision of Bartkus v. Illinois, in which the Supreme Court found no double jeopardy problems with successive Federal and State prosecutions for the same act. The change was noted in the case of Benton v. Maryland, wherein the Court made it clear that the double jeopardy does bind the State.

While the Supreme Court has not overturned Bartkus v. Illinois, the Supreme Court has acknowledged the inherent unfairness of needless multiple prosecutions. Shortly after Bartkus v. Illinois, the Attorney General adopted a Federal policy which barred a Federal trial following a State prosecution for the same acts "unless the reasons are coupelling." This policy was recognized by the Court and Petite v. U.S., 361 U.S. 526, (1960) See also Rinaldi v. U.S., 434 U.S. 22, (1977). It is noteworthy, that the State of New Jersey has also adopted a similar provision, "Former prosecution in another jurisdiction: when a bar" L. 1978 C. 95, Section 2C: 1-11. Criminal Law Reporter Volume 28 October, 1980, March 1981.

In the case of Missouri v. Hunter, 103 S. Ct. 673 (1983) Justice Marshall, with whom Justice Stevens joined in a dessenting opinion made the following observations with regard to double jeopardy prosecutions, to-wit:

"A state has wide latitude to define crimes and to prescribe the punishment for a given crime. For example, a State is free to prescribe two different punishments (e.g., a fine and a prison term) for a single offense. But the Constitution does not permit a state to punish as two crimes conduct that constitutes only one "offence" within the meaning of the double jeopardy clause. For whenever a person is subjected to the risk that he will be convicted of a crime under State law, he is "put in jeopardy of life or limb." If the prohibition against being "twice put in jeopardy" for the "same offence" is to have any real meaning, a state cannot be allowed to convict a defendant two, three, or more times simply by enacting separate statutory provisions defining nominally destinct crimes. If the double jeopardy clause imposed no restrictions on a legislature's power to authorize multiple punishment, there would be no limit to the number of convictions that a state could obtain on the basis of the same act, state of mind, and result. A state would be free to create substantively identicle crimes differing only in name, or to create a series of greater and lesser-included offenses, with the first crime a lesser-included offense of the second, the second a lesser-included offense of the third, and so on."

The Supreme Court states further in the case of Missouri v. Hunter, that:

"The double jeopardy clause forbids either multiple prosecutions or multiple punishment for "the same offence". "Respondent in Missouri v. Hunter, case was convicted of both armed criminal action and the lesser-included offense of first-degree robbery, and he was sentenced for both crimes. Had respondent been tried for these two crimes in separate trials, he would plainly have been subjected to multiple prosecutions for "the same offence" in violation of the double jeopardy clause."

In the instant case, the Appellant was clearly put to trial on the charge of murder of his wife, Rebecca McGuire Heath and that said murder was caused and directed by Appellant in the Superior Court of Troup County, Georgia and a conviction was had by a plea of guilty to the lesser-included offense of murder of Rebecca Heath. The Appellant was also tried and convicted in the Circuit Court of Russell County, Alabama on the charge of Murder During Kidnapping First Degree of his wife, Rebecca Heath and received the death penalty. Both cases were the same in fact and law. Therefore, pursuant to prohibitions against Double Jeopardy as provided by the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Constitution of Alabama, the conviction of the Appellant in the Circuit Court of Russell County, Ala-

bums should be reversed.

CONCLUSION

The Appellant is an indigent and represented by Court appointed Counsel. Appellant was put to trial in the Circuit Court of Russell County, Alabama on a charge of Murder During Kidnapping First Degree of his wife, Rebecca Heath after having been convicted on a charge of Murder and that he directed said murder of his wife, Rebecca Heath, in the Superior Court of Troup County, Georgia. The trial of the Appellant by the Circuit Court of Russell County, Alabama clearly violates the prohibition against Double Jeopardy as set forth in the United States Constitution and the Constitution of Alabama. Therefore, after considering the facts, law, and the argument of Appellant, this case should be reversed.

Further, the Appellant requests the Court to review the record for any other violations of Appellant's rights, pursuant to Beck v. State, 396 So.2d. 645 (1980-1981) and Loper v. State, 415 So.2d. 1204 (1982).

Respectfully submitted,

LARRY W. RONEY, ATTORNEY AT LAW, P.C.

By: _____

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CERTIFICATE OF SERVICE

I, hereby certify that on this the 31st day of March, 1983, I served a copy of the foregoing Brief and Argument on Honorable Charles Graddick, Attorney General, State of Alabama, 250, Administrative Building, Montgomery, Alabama 36130, by mailing said copy to him postage prepaid and properly addressed.

LARRY W. RONEY, ATTORNEY AT LAW, P.C.

BY: Larry W. Roney

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[redacted] APPENDIX [redacted]

FOURTH DIVISION

NUMBER 134

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

LARRY GENE HEATH,

Appellant

vs.

STATE OF ALABAMA,

Appellee

APPEALED FROM THE CIRCUIT COURT OF

RUSSELL COUNTY, ALABAMA

APPLICATION FOR REHEARING

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FOURTH DIVISION NUMBER 134

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

LARRY GENE HEATH,

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vs

STATE OF ALABAMA,

Appellee

APPEALED FROM THE CIRCUIT COURT OF

RUSSELL COUNTY, ALABAMA

APPLICATION FOR REHEARING

Comes now the Defendant, Larry Gene Heath, Appellant in the above styled cause, by and through his Attorney of Record, and moves this Honorable Court to render unto it a rehearing in said cause and to set aside, annul, and hold for naught the judgment of the Circuit Court of Russell County, Alabama. Brief and Argument in Support thereof are submitted.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

[redacted]

FOURTH DIVISION NUMBER 134

IN THE CIRCUIT COURT OF CRIMINAL APPEALS OF ALABAMA

LARRY GENE HEATH,

Appellant

vs

STATE OF ALABAMA,

Appellee

APPEALED FROM THE CIRCUIT COURT OF

RUSSELL COUNTY, ALABAMA

BRIEF AND ARGUMENT OF APPELLANT

IN SUPPORT OF APPLICATION FOR REHEARING

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ATTORNEY FOR APPELLANT

[redacted]

BRIEF AND ARGUMENT

THE RECORD AND THE OPINION OF THE COURT AFFIRMATIVELY SHOWS THAT THE COURT FAILED TO ADDRESS THE ISSUE AS TO WHETHER OR NOT THE APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED UNDER THE UNITED STATES CONSTITUTION WERE VIOLATED BY PROSECUTION BY THE STATE OF ALABAMA FOR THE SAME OFFENSE WHICH IS PRECISELY THE SAME IN LAW AND FACT AS THE FORMER ONE RELIED ON UNDER APPELLANT'S PLEA OF AUTREFOLIS CONVICT AND PLEA OF FORMER JEOPARDY.

In the opinion of the Court rendered on July 5, 1983, the Court failed to address the issue as to whether or not the Appellant was tried and convicted of the offense under the laws of the State of Alabama, which are precisely the same in law and fact as the offense charged against the Appellant in the State of Georgia.

As the Court pointed out on Page 3 of its opinion, there were no cited cases to any Federal case law involving jeopardy in multiple State prosecution and because there were no Federal cases cited, the Court apparently ignored the law relative to multiple prosecutions for an offense, which are precisely the same in law and fact.

Apparently the Court relied on the case of Hare V. State, 367 So. 2 d 299, 300 (Ala. Crim. App. 1980), in reaching its decision in this case. The Hare Case can be distinguished simply by looking at the facts in the Hare Case, wherein the Court in Tennessee was dealing with the offense of a burglary in the State of Tennessee and the Court was dealing with the offense of possession of drugs in the State of Alabama, which are not precisely the same in law and fact.

In the instant case, the Appellant was convicted of the offense of murder during kidnapping first degree in the State of Alabama and was convicted of murder, which was a lesser included offense of the charge of murder caused and directed by the Appellant under the laws of the State of Georgia.

CONCLUSION

Appellant contends that double punishment has been imposed for the same offense which is precisely the same in law and fact and that his Constitutional Rights guaranteed under the Fifth Amendment of the United States Constitution and his Constitutional Rights guaranteed by Article I Section 9, of the Alabama Constitution have been violated. Further, Appellant contends that he relied upon his guaranteed Constitutional Rights as set forth above in pleading guilty to a lesser included offense of murder of his wife in the State of Georgia, wherein he was sentenced to life imprisonment.

The Court ignored the prohibition of multiple prosecutions for the same offense, which are precisely the same in law and fact, in reaching its decision. To allow the conviction in the State of Alabama to stand renders the Fifth Amendment of the United States Constitution null and void.

Therefore, the application for rehearing should be granted.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

[redacted]

CERTIFICATE OF SERVICE

I, hereby certify that on this the 6th day of July, 1983, I served a copy of the foregoing Application For Rehearing and Brief and Argument in Support thereof on Honorable Charles Graddick, Attorney General, State of Alabama, 250 Administrative Building, Montgomery, Alabama 36130 by mailing said copy to him postage prepaid and properly addressed.

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Phenix City, Alabama 36867-0002
ATTORNEY FOR APPELLANT

EXHIBIT A

STATE OF ALABAM.	)	IN TH_ CIRCUIT COURT OF
	)	
Plaintiff	)	RUSSELL COUNTY, ALABAMA
	)	
vs.	)	CRIMINAL ACTION NO. CC 82-392
	)	
LARRY GENE HEATH,	)	
	)	
Defendant	)	

DETERMINATION OF SENTENCE BY THE COURT

The defendant herein, with assistance of counsel at all proceedings, was found guilty as charged in the indictment. Thereafter a sentence hearing with participation by the same jury as at trial was held. Pursuant to Section 13A-5-47, Code of Alabama 1975, the Court makes the following findings of fact summarizing the crime herein and the defendant's participation in the crime:

FINDINGS OF FACT
GUILT PHASE

In early August, 1982 defendant contacted his brother, Jerry Heath, and Jerry Heath set up a meeting at which he, defendant, and Ricky Heath, another brother of defendant, discussed defendant's intentions to kill his wife, Rebecca Heath. Defendant gave Ricky Heath $40.00 for his expenses toward accomplishing that result; however, nothing developed from this meeting.

Defendant thereupon contacted Jerry Heath a second time. Jerry Heath told defendant he knew somebody else that might commit the murder. Subsequently Jerry Heath told defendant to meet a person at an apartment in Columbus, Georgia. This person was Charles Edward Owens. Sometime later Owens and two other men, Gregory Hughes

Lumpkin and Sande.. Williams, went to defenda..'s place of employment. There defendant discussed with Williams the details of his plans. Defendant wanted the homicide to appear to be an accident. Defendant paid Williams $100.00 as a down payment. Later that day defendant wen to Owens' apartment and gave a pistol to Williams. Defendant planned for Williams to force his way into Rebecca Heath's car while she took defendant to work. Williams was then to kill Rebecca Heath and make her death appear to be accidental. The next day defendant gave Owens another $300.00, so that they could obtain an automobile to carry out t.e plan.

Nothing materailized from this plan, and several days later Owens told defendant Williams had left and his whereabouts were unknown. Owens stated to defendant that he and his partner, Gregory Hughes Lumpkin, would do the job for defendant. Approximately two days later, on August 31, 1981, at about 2:00 A. M., Owens called defendan at defendant's home and said that he and Lumpkin were prepared for th job. At 6:00 A. M. defendant locked and left his house. Before leaving he put a brick in his car which was also used by his wife. The brick was to be placed on the accelerator in carrying out the appearances of an accident. He also left a piece of wiring in the car to tie down the steering wheel.

Defendant went to Owens' apartment and explained how he wanted the act done. Defendant then went to the apartment of his girl-friend, Denise Lambert, and waited for a call from Owens. After receiving the call, defendant went to a service station in Columbus,

Georgia, and turned over his automobile, a 19[illegible] green Oldsmobile, to Lumpkin. Owens was also present, driving a white Mustang.

Defendant and Denise Lambert, driving Lambert's truck, led Owens and Lumpkin to Russell County, Alabama. On the road leading to his house, defendant stopped and pointed out the house to Lumpkin. Defendant then left as Owens pulled up beside Lumpkin. Defendant had left his house keys on the key ring with his car keys, so that Lumpkin had the keys to the house. The evidence indicates that Rebecca Heath was in her home when defendant pointed out his house to Owens and Lumpkin. At 9:10 A. M. that same morning defendant's car was seen a short distance off the road known as Smokey Road in Troup County, Georgia. A light-colored Mustang was seen sideways in the road one hundred yards from defendant's automobile. It then went down the road at a high rate of speed.

The body of Rebecca Heath was found at approximately 11:00 A. M. She was dead, having suffered a fatal gunshot wound through the right eye and into the brain. She was nine months pregnant.

In August, 1981 defendant borrowed $2,500.00 from Southern Disco Company. Rebecca Heath was a cosigner of this loan. $500.00 of this loan was used by defendant to build concrete pads for his dog pen. Thereafter defendant formed the intention to use the balance of $2,000.00 to pay for the murder of his wife. This sum of money was used for that purpose.

Rebecca Heath was forcibly abducted from her home in Russell County, Alabama, for the purpose of inflicting sufficient physical

injury to her to use her death. There is no evidence to suggest that at any time she was armed with any weapon. There is no evidence to indicate that the killing of Rebecca Heath was a justifiable or excusable homicide.

Defendant states that he formed the intention and plan to murder his wife because he was under the influence of extreme mental and emotional disturbance based upon his belief that his wife was engaged in an extramarital affair with another man and was pregnant by that man

The Court finds that defendant initiated, procured, aided and abetted, and planned the abduction of Rebecca Heath so that she could be murdered. Defendant intentionally hired others with whom he was acting in complicity to intentionally abduct Rebecca Heath and to intentionally murder the said Rebecca Heath.

FINDINGS FROM SENTENCING PHASE

After the trial a sentence hearing was conducted with participation by the jury. The state rested upon the evidence brought forth at trial. The defendant presented evidence by witnesses called to testify. Arguments were made to the jury by both sides. The jury deliberated after being charged by the Court and unanimously returned a recommendation that defendant's punishment be death.

The Court ordered the probation officer for this circuit to prepare a written presentence investigation report. This report was duly prepared and filed. Copies of the same were furnished to counsel for both parties. A hearing was held for the parties to respond to the report and to present evidence about any part of the report which

would be the subject of a factual dispute. At this hearing the state presented no further evidence. The defendant testified and gave evidence disputing certain matters in the presentence investigation report. The defendant also stated that he did have remorse for the killing of his wife, Rebecca Heath.

The Court finds from the evidence presented in this case that the defendant was guilty and is guilty of the murder of Rebecca Heath during a kidnapping in the first degree of the said Rebecca Heath.

The Court finds the following aggravating circumstance to exist in this case: The capital offense was committed while the defendant was engaged in the commission of a kidnapping.

The Court finds that the following aggravating circumstances do not exist in this case:

A. The capital offense was committed by a person under sentence of imprisonment.

B. The defendant was previously convicted of another capital felony or a felony involving the use of threat of violence to the pers

C. The defendant knowingly created a great risk of death to many persons.

D. The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

E. The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, or burglary.

F. The capital offence was committed for pecuniary gain.

G. The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

H. The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses.

Upon consideration of all of the evidence brought forth at the trial in this case, the sentence hearings, and the presentence investigation report, the Court finds that the following mitigating circumstance exists in this case: Defendant was convicted of the murder of Rebecca Heath in the Superior Court of Troup County, Georgi on February 10, 1982, and received a sentence of life imprisonment in that court.

The Court finds that the following mitigating circumstances do not exist in this case:

A. The defendant has no significant history of prior criminal activity. The Court finds that the defendant does have a significant history of prior criminal activity in that before the sentence hearin in this case he was convicted of three felony offenses, those being buying, receiving or concealing stolen property, forgery, and a crimi attempt of theft by extortion.

B. The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

C. The victim was a participant in the defendant's conduct or consented to it.

D. The defendant was an accomplice in the capital offense

committed by another person and his participation was relatively mino

E. The defendant acted under extreme duress or under the substantial domination of another person.

F. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired.

G. The age of the defendant at the time of the crime.

H. Any other mitigating circumstances offered pursuant to Section 13A-5-52, Code of Alabama 1975.

Upon considering and weighing the aggravating circumstance with the mitigating circumstances in this case, the Court is of the opinion that the aggravating circumstance outweighs any mitigating circumstances. It is, therefore,

ORDERED AND ADJUDGED BY THE COURT that the defendant be sentence to death by electrocution as specified in the laws of this state and as set forth in an order of sentence by this Court.

DONE this the 10th day of February, 1983.

Wayne J. Dawson
Circuit Judge

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT
	)	
Plaintiff	)	RUSSELL COUNTY, ALABAMA
	)	
vs.	)	CRIMINAL ACTION NO. CC 82-392
	)	
LARRY GENE HEATH,	)	
	)	
Defendant	)	

ORDER OF SENTENCING

This case is now before the Court for sentencing. The State is represented by its district attorney and the defendant is present in open court with his counsel, Larry W. Roney, Esq., and R. Michael Raiford, Esq. The Court has previously conducted a sentence hearing with participation by the jury and a hearing for the parties to present evidence regarding matters in the contents of the presentence report and for arguments to be made regarding the proper sentence in this case. The defendant, Larry Gene Heath, being asked by the Court if he has anything to say as to why the sentence of the Court should not be pronounced or before sentence is pronounced says proceedings violate the 5th Amendment and laws of this state.

Upon jury verdict of guilty of murder during kidnapping in the first degree, the Court adjudges the defendant guilty of murder during kidnapping in the first degree, that is, that Larry Gene Heath did intentionally cause the death of Rebecca Heath by shooting her with a pistol, and Larry Gene Heath caused said death during Larry Gene Heath's abduction of, or

attempt to abduct, Rebecca Heath, with the intent to inflict physical injury upon her, in violation of Section 13A-5-40(a)(1) of the Code of Alabama 1975, as amended. Upon consideration of the evidence in this case, the matters brought forth in the sentence hearing, and upon consideration of the aggravating and mitigating circumstances in this case, the Court finds that the aggravating circumstance outweighs any mitigating circumstances.

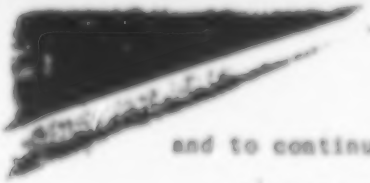
It is, therefore,

ORDERED BY THE COURT that the punishment in this case is fixed at death.

IT IS ORDERED BY THE COURT that the defendant, Larry Gene Heath, be sentenced to death by electrocution on the 17th day of March, 1983.

The Sheriff of Russell County, Alabama, shall deliver the said Larry Gene Heath to the custody of the Warden of the William C. Holman unit of the state prison system at Atmore, Alabama, together with a warrant from the clerk of this court as set forth hereafter.

The executioner designated by the laws of this state, at the proper place specified by law for the execution of one sentenced to death, shall cause a current of electricity of sufficient intensity to cause death to pass through the body of the defendant, with such current of electricity to be applied



and to continue until the defendant, Larry Gene Heath, is dead.

The clerk of this court is ordered to issue a warrant under the Seal of this Court directed to the warden of William C. Holman unit of the state prison system at Atmore, Alabama, for the execution of the sentence of death, which warrant shall recite the fact of conviction and shall set forth specifically the offense, the judgment of the Court, and the time fixed for defendant's execution. Said warrant shall command the warden to proceed at the time and place named in the sentence to carry the same into execution as provided in Section 15-18-82, Code of Alabama 1975. The clerk shall deliver said warrant to the Sheriff of Russell County, Alabama, who shall deliver the same, together with the defendant, Larry Gene Heath, to said warden.

Pursuant to Section 13A-5-55, the judgment of conviction is subject to automatic review. Notice of appeal is entered and the sentence herein is suspended, pending appeal.

DONE this the 10th day of February, 1983.

Wayne J. Dobson
Circuit Judge

APPENDIX B

FILED

JUL 6 1984

CLERK
SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA - - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1984

Ex parte: Larry Gene Heath

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS

(Re: Larry Gene Heath

82-1060 v.

State of Alabama)

FAULKNER, JUSTICE.

The petitioner was convicted of murder during a kidnapping in violation of § 13A-5-40(a)(1), [illegible] of Alabama, and was sentenced to die. The Court of Criminal Appeals reviewed the petitioner's conviction and, after independently determining that

the death penalty was appropriate, affirmed his conviction and sentence. Heath v. State, [4 Div. 134, July 5, 1983] ___ So. 2d ___ (Ala. Crim. App. 1983). We granted certiorari pursuant to A.R.A.P. 39(c).

The facts are set out in detail in exhibit A to the opinion of the Court of Criminal Appeals. In short, Heath hired two men to abduct and murder his wife. After she was kidnapped and shot, her abductors abandoned her body in Georgia. Heath pleaded guilty to murder charges brought in Georgia and was sentenced to life in prison.

In his appeal to the Court of Criminal Appeals and in his petition to this Court, Heath raised only one issue, whether Alabama was prohibited by the double jeopardy provisions of the United States and the Alabama Constitutions from prosecuting Heath for his wife's murder after his murder conviction in Georgia arising out of the same incident. United States Constitution, Amendment V.; Alabama Constitution Art. 1, § 9.

We agree with the Court of Criminal Appeals that the Double Jeopardy Clause of the Fifth Amendment and the double jeopardy clause of the Alabama Constitution each applies only to offenses against the same sovereign and, therefore, that the subsequent prosecution in Alabama was not barred. Prosecutions under the laws of separate sovereigns do not improperly subject an accused twice to prosecutions for the same offense. United States v. Wheeler, 435 U.S. 313, 317 (1978). Thus, a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts on which the federal prosecution was based; nor does a prior state prosecution bar a federal one. Abate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). As the Supreme Court stated in United States v. Wheeler, 435 U.S. at 320:

> "Bartkus and Abbate rest on the basic structure of our federal system, in which

> States and the National Government are separate political communities. State and Federal Governments '[derive] power from different sources,' each from the organic law that established it. United States v. Lanza, 260 U.S. 377, 382. Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other.' Ibid. And while the States, as well as the Federal Government, are subject to the overriding requirements of the Federal Constitution, and the Supremacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power."

The Supreme Court has never considered the question of the applicability, vel non, of the "dual sovereignty" doctrine to consecutive prosecution by two states. It is clear that the "dual sovereignty" concept does not apply in every instance where successive cases are brought by separate entities. For instance, a state and a municipal subdivision of the same state cannot bring successive prosecutions for offenses arising out of the same conduct. Waller v. Florida, 397 U.S. 387 (1970). The states of Alabama and Georgia are clearly separate political sovereignties. However, if, for double jeopardy purposes, Alabama is considered to be a sovereign entity vis-a-vis the federal government then surely it is a sovereign entity vis-a-vis

the state of Georgia.

Alabama may choose not to prosecute individuals in situations like the one at bar where the defendant has been convicted of a serious offense and has received a substantial sentence in another state for an offense arising out of an act punishable under Alabama law. Such an exercise of prosecutorial restraint is not constitutionally mandated, however, and we decline to impose such a policy judicially under the guise of a constitutional pronouncement. See Booth v. State, 436 So. 2d 36 (Fla. 1983). Such a rule would have the undesirable effect of depriving Alabama of the right to enforce its own laws in instances where another state has prosecuted an individual for an offense arising out of the transaction in question, even where the prosecution in another state is for a relatively minor offense.

After reviewing the record and considering the petition, the arguments of the parties, and the opinion of the Court of Criminal Appeals, we are of the opinion that the judgment of the court below affirming the conviction and death sentence is due to be affirmed.

AFFIRMED.

Torbert, C.J., Maddox, Jones, Almon, Shores, Embry, Beatty, and Adams, JJ., concur.

APPENDIX E

FOURTH DIVISION

NUMBER 134

IN THE SUPREME COURT OF ALABAMA

LARRY GENE HEATH

[APPELLANT] PETITIONER

VS

STATE OF ALABAMA,

[APPELLEE] RESPONDENT

APPEALED FROM THE CIRCUIT COURT OF
RUSSELL COUNTY, ALABAMA

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL
APPEALS OF ALABAMA

LARRY GENE HEATH

VS

STATE OF ALABAMA

CIRCUIT COURT OF RUSSELL COUNTY

SUP. CT. NO. _____

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF
CRIMINAL APPEALS OF ALABAMA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF ALABAMA.

Comes now the Petitioner, Larry Gene Heath, by and through his attorney of record, and respectfully petitions this Honorable Court to review and to reverse the decision and judgment of the Court of Criminal Appeals of Alabama rendered in the above styled cause on July 5, 1983, affirming the judgment of conviction had in the Circuit Court of Russell County, Alabama.

Petitioner avers that he has duly filed an Application For Rehearing in the Court of Criminal Appeals of Alabama in this cause within the time required by law, raising the points hereinafter set forth, and that said Application For Rehearing was overruled on August 2, 1983.

As grounds for this Petition For Writ of Certiorari to the Court of Criminal Appeals the Petitioner sets forth and assigns the following, separately and severally:

The basis of this Petition For Writ of Certiorari is as follows:
The Court of Criminal Appeals affirmed the judgment of conviction had in the Circuit Court of Russell County, Alabama, when in fact the record affirmatively shows that Petitioner was convicted in the State of Georgia and in the State of Alabama for the same offense, which is percisely the same in law and fact and that a decision is needed by this Court as to whether or not the prosecution in the State of Alabama constituted double jeopardy in violation of the 5th Amendment of the United States Constitution.

WHEREFORE, THESE PREMISES CONSIDERED, Petitioner urges that a Writ of Certiorari be issued from this Court to the Court of Criminal Appeals and that this Court proceed to review and correct the errors complained of and to reverse the judgment of the Court of Criminal Appeals affirming the judgment of conviction had in the Circuit Court of Russell County, Alabama and render such judgment as said Court should have rendered in addition to such other relief as Petitioner may be entitled.

Respectfully submitted,

LARRY W. RONEY, ATTORNEY AT LAW, P.C.

BY: Larry W. Roney

Larry W. Roney
Post Office Box 128
Phenix City, Alabama 36867-0002
ATTORNEY FOR PETITIONER

* *

I hereby certify that on this the 10th day of August, 1983. I have served a copy of the foregoing Petition For Writ Of Certiorari to the Court of Criminal Appeals of Alabama, properly stamped and addressed and placed in the United States Mail, to the following:

Honorable Charles Graddick
Attorney General
State of Alabama
250 Administrative Building
Montgomery, Alabama 36130

LARRY W. RONEY, ATTORNEY AT LAW, P.C.

BY: Larry W. Roney

Larry W. Roney
Post Office Box 128
Phenix City, Alabama 36867-0002
ATTORNEY FOR PETITIONER

IN TPE SUPREME COURT OF ALABAMA

LARRY GENE HEATH

[APPELLANT] PETITIONER

STATE OF ALABAMA

[APPELLEE] RESPONDENT

APPEALED FROM THE CIRCUIT COURT OF
RUSSELL COUNTY, ALABAMA

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

of

LARRY W. RONEY
ATTORNEY AT LAW
P.O. BOX 128
PHENIX CITY, ALABAMA
ATTORNEY FOR APPELLANT

BRIEF AND ARGUMENT

THE RECORD AFFIRMATIVELY SHOWS THAT THE APPELLANT WAS CONVICTED OF THE SAME OFFENSE, WHICH IS PRECISELY THE SAME IN LAW AND FACT IN VIOLATION OF THE 5th AMENDMENT OF THE UNITED STATES CONSTITUTION.

In the opinion of the Court of Criminal Appeals rendered on July 5, 1983, the Court failed to address the issue as to whether or not the Appellant was tried and convicted of the same offense, which is precisely the same in law and fact as the offense of which he was convicted in the State of Georgia.

As the Court pointed out on Page 3 of it's opinion, there were no cited cases to any Federal case law involving jeopardy in multiple State prosecutions and because there are no Federal cases cited, the Court apparently ignored the law relative to multiple prosecutions for an offense, which are precisely the same in law and fact.

Apparently the Court relied on the case of Hare v State, 387 So. 2 d 299, 300 (Ala. Crim. App. 1980) in reaching it's decision in this case. The Hare case can be distinguished simply by looking at the facts in the Hare case, wherein the Court in Tennessee was dealing with the offense of possession of drugs in the State of Alabama, which are not precisely the same in law and fact.

The Appellant plead guilty to the offense of murder, which was a lesser included offense of the charge of murder caused and directed by the Appellant under the laws of the State of Georgia and received a life sentence. After the Appellant was sentenced in the State of Georgia to life imprisonment, he was returned to the State of Alabama and was prosecuted and convicted of the offense of murder during kidnapping. 1st degree in the State of Alabama for the murder of his wife, Rebecca Heath.

Apparently this case is one of first impression in the State of Alabama, and this Court has not ruled on a similar case involving the offense of murder where only one victim is involved.

CONCLUSION

Appellant contends that his constitutional rights guaranteed under the 5th Amendment of the United States Constitution and his rights guaranteed by Article I Section 9 of the Alabama Constitution prohibiting Double Jeopardy and Double Punishment have been violated. Further, Appellant contends that he relied upon his guaranteed Constitutional rights as set forth above in pleading guilty to a lesser included offense of murder of his wife, in the state of Georgia, and that the prosecution in the State of Alabama on the offense of murder during the course of kid napping of his wife, should be barred.

Therefore, after considering the facts, law and argument of Appellant, a Writ of Certiorari should be issued from this Court to the Court of Criminal Appeals correcting the errors complained of and reversing the judgment of the Court of Criminal Appeals and rendering such judgments as said Court have rendered in addition to such other relief as Petitioner may be entitled.

Respectfully submitted,

LARRY W. RONEY, ATTORNEY AT LAW, P.C.

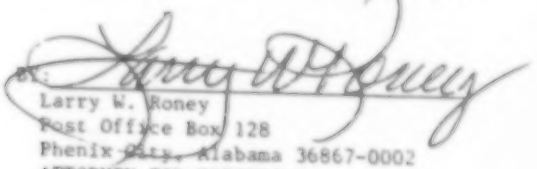
By: Larry W. Roney

Larry W. Roney
P.O. Box 128
Sheffield City, Alabama 35660-0002
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this the 10th day of August, 1983, I served a copy of the foregoing Brief and Argument in Support of Petition For Writ Of Certiorari on Honorable Charles Graddick, Attorney General, State of Alabama, 250 Administrative Building, Montgomery, Alabama, 36130 by mailing said copy to him postage prepaid and properly addressed.

LARRY W. RONEY, ATTORNEY AT LAW, P.C.



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